

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. _____

86-791

PHIL JACOBS; JOSEPH LENTOWSKI;
DAVID SANDY and ROBERT GONZALES,

Petitioners,

v.

KEN KUNES, Maricopa County Assessor,
and the COUNTY OF MARICOPA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding August 20, 1976.

OPINION BELOW

The opinion of the Court of Appeals, *Jacobs v. Kunes*, 541 F.2d 222 (9th Cir. 1976), appears in the Appendix hereto. The opinion of the District Court for the District of Arizona, not reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered August 20, 1976. A timely petition for rehearing was denied on September 22, 1976, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Are civilian governmental employees of the state entitled to any pretermination due process as guaranteed by the Fourteenth Amendment and can the determination of these standards be delegated to the states?
2. Do governmental employers have a right to impose arbitrary grooming regulations, promulgated without any demonstration of justification, on their employers who are nonmilitary, nonuniformed, adult employees?

CONSTITUTIONAL PROVISIONS AND STATUTES

1. United States Constitution Amendment 1: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
2. United States Constitution Amendment 9: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
3. United States Constitution Amendment 14, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. United States Code, Title 42, Section 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subject or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

On Thursday, June 26, 1975, the Petitioners were employees of the County of Maricopa, working for Ken R. Kunes, the county assessor. On said date the employees were given a memorandum to the effect that male employees were to cut their hair above the collar by June 30, 1975 (T.R. p. 20, lines 17-22).

Within four days the Employee Petitioners were not permitted to continue their employment for the reason that they were in violation of the aforementioned memorandum, despite the fact that the Respondent Ken R. Kunes had not seen any of them during these four days. (T.R. p. 29, lines 20-25).

These employees were subsequently suspended without pay and dismissed from their jobs, (T.R. p. 5, lines 14-20) despite the fact that fellow employees both with the County

Assessor's Office and other offices in Maricopa County whose hair length was in violation of said regulation remained on the job. Two of the Petitioners had no dealings with the public. (T.R. p. 8, 53, 56, 58). As a result of the actions taken by the Respondent, Ken R. Kunes, all four Petitioners were dismissed from their employment and have been without means of support and have been denied any reasonable recourse.

Before the Petitioner Employees were suspended there was no notice, discussion or hearing conducted of any type. (T.R. p. 5, lines 22-35, p. 6, lines 1-2). There were no complaints from fellow employees or from the public concerning these four employees. (T.R. p. 7, 39). At no time before legal proceedings were commenced, nor during the hearing thereof, was any justification given for the overnight institution of the said regulation and the drastic penalties for violation thereof.

The Petitioners brought a civil action seeking injunctive and declaratory damages and equitable relief to protect their rights secured by the Constitution of the United States and specifically, the First, Ninth and Fourteenth Amendments to the Constitution of the United States.

This action was brought pursuant to Title 28, USC § 1983, and United States Constitutional Amendments 1, 9 and 14, and supporting affidavits of the Petitioner Employees. Respondents filed a Motion to Dismiss which was heard by the United States District Court in Arizona on August 7, 1975. On August 20, 1975 the United States District Court of Arizona ordered the complaint and action dismissed with prejudice. On September 15, 1975, at a rehearing, the United States District Court of Arizona upheld its prior ruling of

dismissal with prejudice.

On August 20, 1976, the United States Court of Appeals for the Ninth Circuit held that the Petitioners were not required to exhaust their state remedies before proceeding in federal court under a 1983 action. The Court of Appeals, however, found there was no First, Ninth or Fourteenth Amendment protections to be given employees who wish to wear their hair long. In addition, the Court of Appeals held that as long as back pay could be awarded, then the procedural due process requirement would be satisfied even though no hearing or other protection was afforded the permanent employees before they were terminated. Finally, the Court of Appeals concluded that the temporary employees had no due process rights whatsoever.

REASONS FOR GRANTING THE WRIT

1. THE EFFECT OF THE COURT OF APPEALS DECISION IS TO DELEGATE TO THE STATES THE DETERMINATION AS TO WHETHER DUE PROCESS AS GUARANTEED UNDER THE FOURTEENTH AMENDMENT HAS BEEN SATISFIED.

The effect of the Court of Appeals' decision is to delegate to the State of Arizona under its Merit System the determination as to whether due process as guaranteed under the Fourteenth Amendment has been satisfied. This is a radical notion misinterpreting decisions of the United States Supreme Court, specifically *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); and *Bishop v. Wood*, 48 L. Ed. 2d 684 (1976). And if allowed to stand the Court of Appeals' decision

would set a precedent mandating the resolution of the Federal Constitution and due process questions thereunder to the states. The Supreme Court respectfully must make clear that the Fourteenth Amendment is a provision of the Federal Constitution to be interpreted according to national standards and forestall the danger of courts adopting standards in variance with this precedent established since the inception of decision making by the United States Supreme Court. The effect of permitting the lower court's decision to stand in the instant case is to deny Petitioners' any due process rights prior to termination of their employment.

The significance of the Court of Appeals' decision cannot be overemphasized. All government workers will be affected and the Court of Appeals has virtually stripped them of any protection in their employment. The unbridled power to deprive government workers of their livelihood without any recourse prior to termination is a clear reversal of a very definite trend both in state and federal jurisdictions to afford protection to persons in their most prized possession—employment. Historically, employees have been given more safeguards such as the passage of child labor laws, Occupational Safety and Health Act regulations, protection against discriminatory employment practices and minimum wage guarantees.

Yet despite this trend, the Court of Appeals' decision will now permit governmental employers to arbitrarily dismiss a worker without demonstrating any validity whatsoever to the alleged charge, whether the issue be length of hair, race, religious preference, et cetera. The nightmarish vision of governmental employees given no notice, no hearing, no charges, no warning, simply a dismissal from their employment if they do not comply with any regulation established by their employer, no matter how whimsical in nature, will be

a reality if the Supreme Court permits this decision to stand. Retroactive protection is no protection at all.

Petitioners contend that governmental employment is a property right that they cannot be deprived of without due process of law. The arbitrary distinction between temporary and permanent employees is a distinction that could destroy constitutional rights. Further, to allow the state to make these arbitrary distinctions through their merit system allows the states to determine which of its citizens are entitled to federal constitutional protection. The employer could simply avoid a property interest from attaching by merely labeling all employees with less than five or ten or fifteen years service as temporary employees. Since there would be no property interest, there would be no right to due process. Our laws have always protected the sanctity of property. For twentieth century man, employment is his real property. Clearly, such an important valuable entity cannot be subject to the whimsical definitions and labels placed upon governmental employees by the different states, counties, cities and towns.

Petitioners further contend, at a minimum, some rudimentary due process rights must be afforded pretermination wherein the employee has an opportunity to be heard by an independent intervening authority and to answer the charges.

In the case of *Eley v. Morris*, 390 F. Supp. 913 (1975) a thorough analysis of *Arnett v. Kennedy*, 416 U.S. 134 (1974) states:

"Under *Arnett v. Kennedy*, adequate pretermination procedures need not include a full evidentiary hearing, provided an employee is protected by a timely and effective post-discharge hearing procedure. The other minimal protections which should be afforded in these circumstances are unclear, but standards identical to those

upheld in *Arnett* would be constitutionally permissible. *As a minimum, pretermination procedures should include enough delay between receipt of initial discharge notice and the discharge date to allow the discharged employee to obtain a statement of the charges and to refute those charges, in writing and supported by affidavits before a reasonable state official.*" At p. 924 (emphasis added).

The Federal Court found that because the Georgia State Merit System provided no minimum protections, but rather a summary dismissal such as found in the Maricopa County Merit System, that this was in violation of procedural due process. The fact that a full hearing could be had after dismissal was not held to be sufficient. Some type of opportunity to informally answer the charges should have been given the government employees.

The Court of Appeals in its decision has said that due process attaches whenever the merit system says it does. However, the very concept of due process of law does not permit such a fragmentation of its interpretation.

2. THE EFFECT OF THE DISTRICT COURT AND THE COURT OF APPEALS DECISIONS IS TO GRANT UNBRIDLED AUTHORITY TO GOVERNMENTAL CIVILIAN EMPLOYERS TO DETERMINE GROOMING STANDARDS AND HIGHLY PERSONAL MATTERS OF INDIVIDUAL APPEARANCE WITHOUT ANY CORRELATION OR PROOF OF ANY KIND WHATSOEVER AS TO A NEED FOR SUCH STANDARDS OVER THE GOVERNMENTAL CIVILIAN EMPLOYEE.

The Supreme Court has never found it appropriate to allow the regulation of a government employee's hair length unless such an adult was involved with a military organization, a

police force or a fire fighting unit in which discipline and safety are intricately involved. The Petitioners in the case at bar cannot be shown to have come under any of the above categories and should thus be allowed to exercise their First, Ninth and Fourteenth Amendment due process and equal protection rights to be free from government interference with matters that affect the very sanctity and privacy of the human body.

The Court of Appeals has mistakenly relied upon *Kelly v. Johnson*, 425 U.S. 238 (1976). However, the Supreme Court clearly stated in *Kelly, supra*, at page 244 that the citizenry at large *does* have a constitutionally protected right to wear its hair any way it wishes because of the Fourteenth Amendment which grants a "liberty" interest in matters of personal appearance.

Petitioners contend that the unnecessary, arbitrary, and unwarranted regulation imposed by the Respondents is clearly unconstitutional on its face. However, the manner in which it has been imposed is a further and very serious violation of Petitioner's rights.

Petitioners were told to have their hair cut above the shirt collar on a Friday and the following Monday they were discharged. Yet, another co-employee testified that he was told to cut it to below the collar line and further, he asked if he could keep it that way a few days, which was allowed. (T.R. p. 54). Mr. Kunes' chief deputy had hair that was in violation of the new regulation. (T.R. p. 8). An employee from another department within Maricopa County still working testified. The Court described him as an individual with a full beard with substantial growth and full hair, well down below the bottom of his collar. Such blatant, arbitrary and

discriminatory practices cannot be tolerated under the Fourteenth Amendment guarantee of substantive due process and equal protection. *Ramsey v. Hopkins*, 320 F. Supp. 477 (1970); *Brown v. Schlessinger*, 365 F. Supp. 1204 (1973); and *Reichenberg v. Nelson*, 310 F. Supp. 248 (1970).

Individual liberty is the cornerstone of our system of laws. Unless there has been the need for government encroachment we have not permitted the same. At what point do we say enough government harassment? This is not a dress code wherein a change of clothes at the end of the work day can rectify the requirements of employment. Hair is an integral part of an individual and personality. This issue goes to the very heart of what type of society we shall have. It is necessary that the Supreme Court address itself to this crucial and compelling issue of unjustified governmental intrusion upon the private lives of its citizens and the instant case provides such a vehicle.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | | |
|--------------------------------|---|-------------------|
| PHIL JACOBS, JOSEPH LENTOWSKI, |) | |
| DAVID SANDY, and ROBERT |) | |
| GONZALES, |) | No. Civ. 75-446 |
| |) | Phx. WPC |
| Plaintiffs, |) | <u>MEMORANDUM</u> |
| vs. |) | |
| KEN R. KUNES, Maricopa County |) | <u>AND</u> |
| Assessor, and the COUNTY OF |) | <u>ORDER</u> |
| MARICOPA, |) | |
| Defendants. |) | |

Plaintiffs are probationary and non-porbationary employees of the Maricopa County Assessor's office. Defendant Ken Kunes is the elected County Assessor and as such is in charge of and in one sense the "employer" of all employees of that department.

On June 26, 1975, Mr. Kunes by written memorandum established as a grooming standard for all male employees that they must have "their hair cut above the shirt collar". Some employees promptly complied. The plaintiffs refused and were first suspended, then terminated for that reason. It is defendants' intention to uniformly apply that standard to all male employees unless prevented by order of this Court.

Plaintiffs assert jurisdiction pursuant to 28 U.S.C. §§ 1331(a) & 1343(3) and 42 U.S.C. § 1983, claiming that enforcement of this standard is state action in violation of a number of their constitutional rights. For this court to proceed, plaintiffs must establish that the standard constitutes a clear violation of some specific constitutional guarantee.

Most (but not all) of the hair cases in federal court have

arisen in the context of school regulations, but the constitutional implication would appear to be the same in employer cases. *Fagan v. Nat'l Cash Register*, 481 F.2d 1115 (D.C. Cir. 1973). The circuits are about evenly split on whether a standard for male hair grooming violates any constitutional right. *Fagan v. Nat'l Cash Register*, supra at 1118, nn. 5 and 6. As noted in *Fagan* at 1118:

"The Fifth Circuit, en banc, 1972, 460 F.2d 609, not only reversed the District Court, but announced a per se rule directing the District Courts thereafter to dismiss, forthwith, for failure to state a valid claim, a complaint which 'merely alleges the constitutional invalidity of a high school hair and grooming regulation.' "

It appears to this Court that the Ninth Circuit is firmly with those circuits which hold that no constitutional issue is involved here. *King v. Saddleback Jr. College District*, 445 F.2d 932 (9th Cir. 1971); *Campbell, et al., v. Beaughler, et al.*, ___ F.2d ___ (9th Cir. June 23, 1975, No. 74-1763), which indicates "serious doubt that hair length regulations pose any cognizable constitutional questions", and with apparent approval quotes the following from *Zeller v. Donegal School District Board of Education*, ___ F.2d ___ (3rd Cir. May 14, 1975), plurality opinion:

"[W]e determine today that the federal court system is ill-equipped to make value judgments on hair lengths in terms of the Constitution—whether an athletic code requiring that hair be 'neatly trimmed' would not pass muster, whether one putting the limit on hair twelve inches below the collar would pass, or whether one drawing the line at four inches below the collar would be more difficult of solution. A very real concern is that the decisional process not become, in the phrase of

Justice Hopkins, 'amorphous and growing out of a shifting foundation laid on morals or community welfare' so as to invite 'indiscriminate use by the courts in the name of either expediency or a private view of morality—both of which take on color and shade from the eye of the beholder.' "

* * *

"Having made a policy determination, it is important to underscore why we have drawn the line we have. In full recognition of the duty of federal courts to be hospitable to claims for redress of constitutional infringements, we have ruled deliberately. We have acted because of a felt concern that the sturdy tree of the federal judiciary is in need of pruning if it is to remain strong and stand tall, protecting basic individual liberties against unconstitutional impingements. We are concerned that, if the trimming process does not begin somewhere, the tree may topple of its own weight; that the proliferation of claims with exotic concepts of real or imagined constitutional deprivations may very well dilute protections now assured basic rights. We have a genuine fear of 'trivialization' of the Constitution. If this should occur, some of the monumental accomplishments in defining fundamental human rights and liberties may be compromised, and the protections accorded those rights and liberties threatened."

The court in *Fagan*, supra, also notes the number of instances in which the Supreme Court has denied certiorari in hair cases, despite the conflict among the circuits, and concludes at page 1119: "We may fairly assume this much, it would appear, the Supreme Court sees no federal question in this area."

This Court agrees.

IT IS ORDERED;

Defendants' motion to dismiss the complaint is granted. The complaint and action are dismissed with prejudice and the Clerk will enter judgment accordingly.

DATED August 19, 1975

/s/ William D. Copple
United States District Judge

(Title of Action)

MEMORANDUM AND ORDER

Plaintiffs have filed herein a motion for rehearing, correctly noting two issues in this case which were not discussed or specifically ruled upon in this Court's prior decision, i.e.,

1. Whether plaintiffs were deprived of a property right (expectancy of continued employment) without due process of law;
2. Whether plaintiffs must exhaust available administrative remedies before coming to this court claiming such lack of due process deprivation.

The basis for such a property right in public employees was defined in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972), and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694 (1972). The limitations on asserting such rights were clarified in *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633 (1974), and its progeny.

The Maricopa County Merit System provides available due process procedural protection for both probationary and nonprobationary employees. See Rule 10 and Rule 11 of said Merit System's rules and regulations. These due process procedures must be exhausted before plaintiffs can complain here of a deprivation of a property right without due process of law. *Arnett v. Kennedy*, *supra*.

IT IS ORDERED: As amplified above, the prior ruling of this Court will stand.

DATED September 15, 1975.

/s/ William D. Copple
United States District Judge

(Title of Action)
(FILED: August 20, 1976)

OPINION

Appeal from the United States District
Court for the District of Arizona

Before: WRIGHT, CHOY and GOODWIN, Circuit Judges.
CHOY, Circuit Judge:

Defendant Kunes is the County Assessor of Maricopa County, Arizona. His office assesses property, collects some taxes, and handles motor vehicle licensing. The plaintiffs were employed in the Assessor's office.

Kunes, in response to customer comments, issued a memo requiring that male employees wear their hair cut above the collar. Three employees complied. When the plaintiffs did not, they were suspended and eventually fired.

Plaintiffs thereupon brought a Civil Rights Act, 42 U.S.C. § 1983, action in federal district court under 28 U.S.C. § 1343. They alleged violations of their first, ninth, and fourteenth (both equal protection and due process) amendment rights.

The district court dismissed the action on the merits,^{1/} and for lack of exhaustion of administrative remedies.

Plaintiffs appeal. We affirm in part, reverse in part and remand in part.

Exhaustion

As the purpose of the administrative remedy provided by Ariz. Rev. Stat. § 11-356 and Maricopa County Merit System Rule (Merit Rule) 11 is to remedy, rather than forestall, a

deprivation, plaintiffs were not required to exhaust it. *Whitner v. Davis*, 410 F.2d 24, 28-29 (9th Cir. 1969).

Substantive Constitutional Claims

Plaintiffs argue that the hair length requirements (hereinafter "regulation") impinged upon several substantive constitutional rights: first amendment freedom of expression; ninth amendment right to privacy; fourteenth amendment substantive due process; and fourteenth amendment equal protection.

With the exception of the equal protection claim, the substantive claims are disposed of by the Supreme Court's decision in *Kelley v. Johnson*, — U.S. —, 44 U.S.L.W. 4469 (Apr. 6, 1976). In *Kelley* the Court upheld restrictions on hair length and facial hair for policemen.^{2/}

The Court found that the State's police power extended to the protection of persons and property through a uniformed police force, and that the State had wide latitude in the execution of this function and was entitled to a presumption of validity of the choices it made.

The test used was "whether [the] determination that such regulations should be enacted is so irrational that it may be branded 'arbitrary' and therefore a deprivation of [a] 'liberty' interest in freedom to choose [a] hairstyle." *Id.* at —, 44 U.S.L.W. at 4472. This test is drawn from *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). This type of test has generally been used in substantive areas where the Court felt it ought to defer to legislative choice.^{3/} Its use in *Kelley* seems to indicate that the hair length of public employees is such an area.

The Assessor's office is carrying out tasks within the police

power. The office is entitled to latitude in performing its functions, and the regulation is entitled to a presumption of validity. Particularly given the customer comments to which it was a response, we cannot find the regulation so irrational as to be a deprivation of liberty.

The *Kelley* Court subsumed ninth amendment claims equivalent to those raised in this case in the substantive due process claim discussed above. It rejected a first amendment claim on its merits. *Id.* at ___, 44 U.S.L.W. at 4471. The first and ninth amendment claims in this case have no more merit than those in *Kelley* and are rejected as well.

Neither is there any merit in the equal protection claim. *Campbell v. Beaughler*, 519 F.2d 1307 (9th Cir. 1975), *cert. denied*, ___ U.S. ___, 44 U.S.L.W. 3416 (Jan. 20, 1976); *King v. Saddleback Jr. College Dist.*, 445 F.2d 932 (9th Cir.), *cert. denied*, 404 U.S. 979 (1971).^{4/}

Due Process Claim

Plaintiffs also allege that they had a property interest in continued employment and that the procedures for termination of employment were not adequate under the due process clause.^{5/}

It appears that public employees who can be dismissed from their positions only "for cause" have a property interest in continuing employment. *Bishop v. Wood*, ___ U.S. ___, 44 U.S.L.W. 4820, 4821 n. 8 (June 8, 1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974).

Two of the plaintiffs^{6/} in this case were "temporary" employees, hired to fill positions to be in existence for only a limited period of time. Merit Rule 7.5. They are not given any guarantee that they will not be dismissed except for

cause. Therefore it does not appear that they have a property interest in their positions and we affirm the district court's dismissal as to them.

The other two plaintiffs^{7/} were "permanent" employees, subject to dismissal only for cause.^{8/} Merit Rule 10. They did have a property interest, and can challenge the procedures for termination.

At least three of the members of the Supreme Court — Chief Justice Burger, and Justices Stewart and Rehnquist — are of the opinion that the property interest created by public employment is limited to the procedures set out for terminating it and that due process requires only that those procedures be complied with. *Arnett v. Kennedy*, 416 U.S. 134 (1974) (Rehnquist, J.). The procedures set out by the Merit Rules were followed here. See Merit Rule 10.

Other justices take the position that the Constitution is an independent source of procedural requirements once a property interest has been granted. *Id.* at 167 (Powell, J., concurring, joined by Blackmun, J.); *Bishop v. Wood*, ___ U.S. at ___, 44 U.S.L.W. at 4826 (White, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.).

It appears that of the justices who look to the Constitution for procedural requirements, at least Justices Powell and Blackman would uphold the system of Maricopa County involved here if backpay can be awarded to employees found to have been wrongfully dismissed. Justice Powell's opinion in *Arnett*, *supra*, reasoned that due process required a full hearing at some time before the deprivation became final. As the property in which the employee ordinarily has an interest in his income, where, as under the Maricopa County system, an adequate hearing is not provided until after

payment of that income has been suspended, it must be possible to award backpay when the hearing is finally held to prevent the deprivation from being final without due process.^{2/}

Merit Rule 11.16 provides that "[t]he Commission shall have the power to direct appropriate remedial action...." Whether such "appropriate remedial action" can include an award of backpay does not appear in the record before this court. There is, therefore, a material issue of fact to be resolved and the permanent employees' due process claim should not have been dismissed.

Conclusion

That portion of the judgment dismissing the action for lack of exhaustion is reversed.

The dismissal of the temporary employees' claims is affirmed.

The dismissal of the permanent employees' claims is reversed solely on the due process issue and is remanded for further proceedings on that issue.

No. 75-3146

Footnotes

1. [reference at page 1]

The motion to dismiss was made under Fed.R.Civ.P. 12(b)(6), or alternately for summary judgment under Fed.R.Civ.P. 56. The district judge did not indicate on which the dismissal was based. We will treat it as a summary judgment because the district judge had to look at at least the merit system rules in addition to the pleadings. It does not make any difference for the result.

2. [reference at page 2]

See also *Quinn v. Muscare*, ___ U.S. ___, 44 U.S.L.W. 4627 (May 4, 1976) (fireman hair length regulation).

3. [reference at page 3]

See generally Note, *Developments in the Law—Equal Protection*, 82 Harv.L.Rev. 1065 (1969); G. Gunther & N. Dowling, *Cases & Materials on Constitutional Law* 974-78 (8th ed. 1970).

4. [reference at page 3]

Other circuits have held otherwise. See e.g., *Massey v. Henry*, 455 F.2d 779 (4th Cir. 1972); *Landsdale v. Tyler Jr. College*, 470 F.2d 649 (5th Cir. 1972).

5. [reference at page 4]

There must be a deprivation of life, liberty, or property for there to be a due process issue. *Board of Regents v. Roth*, 408 U.S. 564, 569-71 (1972).

6. [reference at page 4]

Apparently *Jacobs and Gonzales*.

7. [reference at page 4]

Apparently *Lentowski and Sandy*.

8. [reference at page 4]

"Cause" is defined in § 17 of the Resolution (Dec. 24, 1969) of the Maricopa County Board of Supervisors adopting the county merit system to include improper attitude, insubordination, and willfull disobedience. There is no claim that, if plaintiffs' conduct is not substantively protected, there was not cause.

9. [reference at page 5]

As it is only the view of two justices (albeit necessary to assure a

majority of the Court on the due process issue) the notion that the deprivation is not final so long as backpay can be awarded does not change our holding on exhaustion, *supra*.